

## **42 U.S.C. §1983 - ARREST**

### **Nieves v. Bartlett, --- U.S. --- (2019)**

**Decided May 28, 2019**

**FACTS:** During an Alaska event called the Arctic Man – an “extreme ski event” in the mountains near Paxson, Alaska. The event draw large crowds and includes “high levels of alcohol use.” Troopers Nieves and Weight (Alaska State Police) were sent to the parking lot to investigate underage drinking.

During the investigation, Trooper Nieves tapped on Bartlett’s shoulder and asked him if “they could talk.” Bartlett refused to do so and asked if he was free to go, and the trooper allowed him to walk away. A little later, about 1:30 a.m., Bartlett saw a minor he’d accompanied to the party talking to Trooper Weight. He approached the pair and told the trooper that he didn’t “have the authority to talk to him without a parent or guardian present.” (It was suggested that he spoke loudly due to the music playing.) The trooper said “No” and pushed Bartlett, who later claimed his hands came up in reaction to the shove. Trooper Nieves grabbed Bartlett’s arm and ordered him to back up, while Trooper Weight grabbed the other, and they tried to force Bartlett to the ground. Bartlett “hesitated,” as he later said he did not want to aggravate an existing back injury. They threatened him with a Taser and he then voluntarily went prone to the ground and put his hands behind his back.

Bartlett was placed into a cruiser and told he was under arrest for “harassing” the trooper. They loosened his cuffs when he complained. At some point, he claimed, Trooper Nieves stated that “bet you wish you would have talked to me now,” a statement that would prove critical in later proceedings. He was charged with disorderly conduct and “resisting or interfering with arrest.” The troopers drafted a report, which Bartlett later claimed was “fabricated in that it contain[ed] many false statements.” Ultimately, the state dismissed the charges against Bartlett.

Bartlett filed suit under 42 U.S.C. §1983, claiming that he should be “free from unlawful assault by a police officer, to be free from a malicious criminal prosecution, to not be falsely incarcerated, unreasonable search and seizure, freedom of speech, equal protection of the law and his right to due process.” In particular, he noted that he did not attempt to head-butt the troopers, as the report indicated, nor did he throw punches. He also claimed he did not yell back into his RV, which was nearby, that the occupants did not have to talk to the troopers. Several videos were submitted, from different angles, and some were subject to more than one interpretation. (In fact, a news crew was with Trooper Nieves.) The troopers claim they were entitled to qualified immunity in the arrest.

The District Court reviewed the various allegations. With respect to the false arrest claim, the Court agreed that “it is well established that an arrest without probable cause violates the Fourth Amendment.” Further, it noted the “the ultimate touchstone ... is ‘reasonableness.’” “To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them ‘fair leeway for enforcing the law in the community’s

protection.” If “it was reasonable for an officer to suspect that the defendant’s conduct was illegal,” then “there was no violation of the Fourth Amendment.” The standard is objective, and so “[w]e do not examine the subjective understanding of the particular officer involved.” Even if it was arguable, and reasonable officers might disagree on the legality of an arrest, they might still be entitled to qualified immunity. Bartlett was told that he was being arrested for harassment – which under Alaska law was when “with intent to harass or annoy another person, that person ... insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response.” Looking at the undisputed facts, the Court agreed that his conduct spurred the “violent response,” even if that was not his intent, given his loud voice and hand movements. The District Court agreed that the troopers had probable cause for the arrest.

With respect to his malicious prosecution claims, the District Court found no indication that they had exercised any influence over the prosecuting attorney that would have swayed his decision, and in fact, helped him locate video of the event that was not in the possession of the ASP.

With respect to Bartlett’s excessive force claim, the Court looked to Graham v. Connor and its “objective reasonableness” standard.<sup>1</sup> It noted that “not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates the Fourth Amendment.” The troopers noted that no case law suggested that their actions were inappropriate or excessive, and that they did, in fact, a “controlled takedown.” Looking at the Graham factors, the Court noted that in hindsight, his offense was minor, but that the circumstances did suggest a possible threat to the troopers and the public. Trooper Weight’s shove, which did not even knock Bartlett down, served only to put distance between them. When he complained about the handcuffs, they were immediately loosened and he suffered no injury as a result. The Court agreed that the troopers were entitled to qualified immunity on the claim.

With respect to the First Amendment, the District Court noted “criticism of the police is not a crime, and even obscene gestures and words directed towards police officers, without more, will not support probable cause to arrest.” The Court agreed, however, that there had not yet been a case recognizing a “First Amendment right to be free from a retaliatory arrest that is supported by probable cause.” Bartlett believe his arrest was “motivated purely by a desire to retaliate against a verbal challenge to an officer’s authority.” The Court agreed, however, that since the troopers had adequately shown that they had probable cause to support the arrest, he could not maintain a First Amendment claim.

Finally, the District Court agreed that there was no evidence that the media footage was improperly withheld or that it was ever even in the possession of the prosecutor or the police. It agreed that without individual claims, there could be no conspiracy claim, either. The District Court ruled in favor of the troopers.

Bartlett then appealed to the Ninth Circuit Court of Appeals. It affirmed the decision on the issue of the false arrest and force claims, as well as the malicious prosecution claim. The Court,

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<sup>1</sup> Graham v. Connor, 490 U.S. 386 (1989).

however, reversed the trial court's decision on the retaliatory arrest claim, noting in it had held, in the past, that a "plaintiff can prevail on a retaliatory arrest claim even if the officers had probable cause to arrest," despite the decision in Reichle v. Howards.<sup>2</sup> The Court agreed that the threat of an arrest would "chill a person of ordinary firmness from future First Amendment activity."

The Troopers requested certiorari on the retaliatory arrest claim, and the U.S. Supreme Court granted review.

**ISSUE:** Does probable cause defeat a First Amendment retaliatory-arrest claim under 42 U.S.C. §1983?

**HOLDING:** Yes, in most instances.

**DISCUSSION:** The Court noted that the issue it was "asked to resolve" is "whether probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment." Although the issue had been brought in twice in recent court terms, it had been left essentially unanswered. The Court found the facts of this matter, however, appropriate to directly address the issue.

The Court agreed that "[A]s a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" when they are "engaging in protected speech."<sup>3</sup> If the official does something based on a retaliatory motive, and there is insufficient grounds to have provoked the consequences (such as an arrest) absent that motive, the injury party make seek relief.<sup>4</sup> To prevail, the plaintiff must be able to show a "'causal connection' between the government defendant's 'retaliatory animus' and the plaintiff's 'subsequent injury.'" The motive and the injury must be linked together, and that "but-for" the motive, the action would not have occurred.

Often, the court agreed, the connection was straightforward and obvious. In Hartman, however, the Court required plaintiffs to further and "prove as a threshold matter that the decision to press charges was objectively unreasonable because it was not supported by probable cause." The officers in the instant case "argue that the same no-probable-cause requirement should apply to First Amendment retaliatory arrest claims." The Court agreed that such claims often "give rise to complex causal inquiries." But, in short, the Court agreed that the "plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest."

Further, the Court agreed, it had "almost uniformly rejected invitation to probe subjective intent" – preferring to depend instead on the "application of objective standards of conduct,

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<sup>2</sup> 566 U.S. 658 (2012); See also Hartman v. Moore, 547 U.S. 250 (2006).

<sup>3</sup> Hartman, *supra*.

<sup>4</sup> Crawford-El v. Britton, 523 U.S. 574 (1998); Mt. Healthy City Bd. Of Ed. v. Doyle, 429 U.S. 274 (1977).

rather than standards that depend upon the subjective state of mind of the officer.”<sup>5</sup> The Court noted that although, as a rule, “probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.” It emphasized that when 1983 was first adopted, officers in most of the country were much more limited in their ability to make warrantless arrests for misdemeanors. That has changed, however, and such arrests are now permitted “in a much wider range of situations.” It left intact the possible argument that a plaintiff could raise, that the subject “was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.”

However, in Bartlett’s situation, the court agreed that despite the statement made by Nieves, that Trooper Weight, who made the arrest, had no knowledge of the prior interaction. The Court agreed that the troopers had probable cause for the arrest and that his “retaliatory arrest claim fail[ed] as a matter of law.”

The Court reversed the decision of the Ninth Circuit Court of Appeals and the case was remanded.

**FULL TEXT OF DECISION:** [https://www.supremecourt.gov/opinions/18pdf/17-1174\\_m5o1.pdf](https://www.supremecourt.gov/opinions/18pdf/17-1174_m5o1.pdf)

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<sup>5</sup> Supra.